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REPORT OF THE WORKING GROUP ON INTERNATIONAL SHIPPING LEGISLATION ON ITS TWELFTH SESSION

Held at the Palais des Nations, Geneva,
from 22 to 30 October and on 1 November 1990

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INTRODUCTION

1. The twelfth session of the Working Group on International Shipping Legislation, convened pursuant to Committee on Shipping resolution 61 (XIII), was held at the Palais des Nations, Geneva, from 22 October - 1 November 1990. In the course of the session, the Working Group held eight (88th-95th) plenary meetings.

Chapter I

CHARTER PARTIES

(agenda item 3)

2. For its consideration of this item, the Working Group had before it the following documentation:

> "Charter parties: a comparative analysis - report by the UNCTAD secretariat" (TD/B/C.4/ISL/55).

3. The Director of the Shipping Division recalled that the Working Group had begun consideration of the subject of charter parties at its fourth session in 1975 but that its further examination had had to be postponed until after the completion of work on marine insurance and on maritime liens and mortgages.

4. With regard to the secretariat's report (TD/B/C.4/ISL/55), the comparative analysis of different clauses in various charter party forms clearly demonstrated that a number of important standard form charter party clauses were ambiguous, uncertain in their operation and, when subjected to the scrutiny of courts, variously interpreted and prone to divergent constructions by different national régimes. To illustrate the situation, the report had used many British and United States court decisions and some New York arbitration awards, but very few London arbitration awards had been referred to because London arbitration awards were not published.

5. There had been repeated calls for modernization and improvement of charter parties which dated back to the beginning of the century and which were still being used without adaptation to the requirements of modern commercial life.

6. In that connection, and further to the recommendations in the secretariat's report, the Working Group might wish to give consideration to redrafting and updating charter party core clauses and to drafting agreed definitions of charter party terms in order to assist in reducing disputes and to promote uniformity of interpretation of charter party clauses. In this context, valuable work had been carried out at the initiative of the CMI, as a result of which the so-called "Charter Party Laytime Definitions 1980" had been jointly issued by the CMI, BIMCO, GCBS and FONASBA. Unfortunately they had not been sufficiently promoted, for example by incorporation into the standard charter party forms, and consequently they were not frequently used. The fact that a considerable number of voyages were performed without any problem did not undermine the need for improvement and greater clarity and uniformity. That was also true in relation to other components of international trade to assist the parties in clearly identifying their rights and obligations and to protect themselves.

7. Particular problems arose where a bill of lading issued under a charter party was governed by the Hague or Hague-Visby Rules while the underlying charter party was not. Where contractual responsibilities for loss of or damage to cargo under a charter party differed from the Hague and Hague-Visby Rules, shipowners' liabilities could change during the voyage depending upon whether or not the bill of lading issued pursuant to the charter party had been negotiated to a third party. Modern charter parties tried to avoid

this inconsistency by incorporating the Hague/Hague-Visby Rules through a paramount clause, and the report illustrated that uncertainties and disputes quite often arose out of such an approach. It was therefore proposed in the report that the Working Group consider drafting a set of rules based on the Hague/Hague-Visby Rules especially designed for charter parties.

8. With regard to the argument that charter parties were private contracts between shipowners and charterers without any impact on third parties and requiring no mandatory regulation, it should be stressed that, as the report showed, third-party bill-of-lading holders could be bound by the terms of a charter party they had never seen. Moreover, mandatory legislation would still leave parties free to negotiate the special terms they required for their particular charter party.

9. The spokesman for the Group of 77 (Ghana) said that the question of charter parties was particularly important for developing countries, as they were increasingly entering the tanker and dry bulk trades, which required a good understanding of the chartering process. Also, as developing countries increasingly acquired their own tonnage, it was imperative that they base their chartering trade upon a firm and rational foundation, with modern charter party forms drafted with developing countries in mind.

10. The secretariat's report clearly demonstrated that the current system of chartering was unsatisfactory from both a legal and a practical point of view. Many clauses of standard charter party forms commonly in use were unclear and contained antiquated wording. A number of widely used standard charter parties were not sufficiently comprehensive, requiring a large number of additional clauses which were in themselves considered a source of disputes and litigations because of frequent contradictions between printed and additional clauses and indeed between additional clauses themselves.

11. The modifications and improvements carried out by international and commercial organizations during the past decade did not appear to have been sufficient. Very old and outdated charter parties continued to be used and continued to give rise to a large number of disputes. Furthermore, since standard charter party forms were mainly drafted by shipowning interests, they were often heavily weighted in the shipowners' favour. It was therefore essential that any substantive reforms be conducted under the auspices of UNCTAD, taking into account the interests of both developed and developing countries, as well as charterers, cargo interests and shipowners.

12. International action in the field of charter parties was long overdue, and the Group of 77 therefore fully endorsed the recommendations made by the secretariat in its report. It particularly supported international legislative action. Failure to improve the situation with regard to charter parties would detract from the effectiveness of international regulation of bills of lading. Many of the factors justifying the mandatory application of international rules to bills of lading also applied to charter parties, in particular concerning greater uniformity, certainty and clarity.

13. Lack of certainty and predictability was detrimental to all interested parties, but the developing countries always found that they suffered disproportionately in relation to the developed countries. Moreover, by virtue of the existence of an internationally acceptable mandatory régime in respect of bills of lading but not in respect of charter parties, there were

differences in the obligations of the carrier for the execution of the contract of carriage without unreasonable delay or deviation, for the provision of a seaworthy vessel and for care and custody of the cargo. It was quite ironic that such fundamental issues should be those upon which bills of lading and charter parties should vary.

14. Where no internationally accepted régime applied to charter parties, shipowners could exclude liability for loss or damage to cargo caused by their negligence. There was, therefore, a need to protect owners of cargo shipped on tramp vessels by mandatory regulations to the same extent that owners were protected under bills of lading in the liner trade. Furthermore, the secretariat's report had shown that third parties would also be affected by the terms of charter parties. Depending on the terms of incorporation clauses in bills of lading, parts or even all terms and conditions and clauses of a charter party could be imposed upon a third-party bill-of-lading holder who had no knowledge of the charter party.

15. He emphasized that, in addition to drafting and updating core clauses of standard charter party forms, consideration had to be given to drafting a set of definitions of terms used in charter parties.

16. Finally, the Group of 77 strongly recommended that the work on charter parties be extended in order to include bareboat charter parties. The subject was of considerable importance to developing countries, since long-term charters on demise or bareboat terms were increasingly being used in ship financing and could seriously impinge upon the economic aspirations of developing countries purchasing tonnage. Also in the context of bareboat charter registry, the demise or bareboat charter had serious implications in the spheres of both private and public international law.

17. The spokesman for Group B (Netherlands) said that the secretariat's report provided a broad and balanced analysis of certain clauses of time and voyage charter parties. However, irrespective of the problems mentioned in the report, commercial parties engaged in chartering activities generally felt quite comfortable when working with charter parties. While the process of chartering was not completely problem-free, disputes on matters of fact and interpretation of clauses could not be avoided. Furthermore, attention was drawn to the new and revised charter party forms introduced into the market in recent decades which reflected changing market conditions. Of course, Group B countries were willing to examine and, if possible, ameliorate any particular circumstances related to chartering which gave rise to difficulties and adversely affected the economic interests of developing countries.

18. Referring to the positions taken by the different regional groups at the Working Group's fourth session in 1975, he said that no attempt had been made in document TD/B/C.4/ISL/55 to assess the economic consequences of chartering for developing countries, and he therefore assumed that UNCTAD's 1974 findings (TD/B/C.4/ISL.13, para. 16) were still valid, namely that an assessment of the economic consequences of the present system, in the sense of calculating what could be saved if the cost of existing arrangements were revised, had proved to be impossible. He invited the Group of 77 to inform the Working Group about any eventual adverse implications for their economies which they had detected.

19. With regard to the recommendations and conclusions of the report, the so-called "core" clauses in charter parties had to a large extent already been harmonized and standardized, though it had to be realized that it was not always possible to achieve an ideal solution. Clauses constituting any particular form of charter party had to be considered to be an integral part of the whole document and could not always be taken out of context and be replaced by other similar clauses without disturbing the balance of the negotiated document. Clauses used in a charter party for a particular trade in one part of the world could not necessarily be applied to a charter party covering a completely different trade in another part of the world. In addition, charter party conditions had to a certain extent to reflect the terms agreed between the seller and the buyer of the goods carried, and agreeing on standard charter parties was a purely commercial matter which could only be of any practical significance if the charter party had been agreed individually for a particular trade.

20. With regard to international legislation, Group B strongly believed that the application of mandatory legislation to charter parties would hamper or eliminate the flexibility inherent in the present system, by which the parties were allowed complete freedom of contract. This freedom was vital in order to maintain full flexibility in negotiations and to achieve cost efficiency for the parties involved, and on the question of mandatory international law the report had not established a need for such regulation, nor had it demonstrated that such regulation was desirable or workable.

21. Nevertheless, unified definitions for the multitude of chartering terms were - at least theoretically - desirable to remove some of the uncertainties existing, including problems arising from different interpretations in different countries and under different court systems. Referring to experience with the Charter Party Laytime Definitions 1980, he expressed serious doubts as to their practical use and as to whether a more elaborate set of definitions would be of any benefit for the industry.

22. Finally, with regard to the organization of work of the Working Group, the proposal to establish a subgroup of experts (TD/B/C.4/ISL/54, para. 4) was unacceptable to his Group, at least at such an early stage. In the view of Group B, the acceptance of such a proposal would prejudge the outcome of the Working Group's deliberations on the contents and findings of the secretariat's report. If at all established, such a subgroup of experts would require a clearly defined mandate which could only be provided after an in-depth discussion of the findings and conclusions drawn in the report. Group B therefore suggested that the Working Group revert to the question of setting up a subgroup of experts, if at all necessary, at the end of an in-depth discussion on document TD/B/C.4/ISL/55.

23. The spokesman for Group D (Union of Soviet Socialist Republics) underlined the importance of the subject of charter parties and the necessity of finding a mutually acceptable solution to existing problems.

24. He reminded the Working Group that the decision to consider the subject of charter parties had already been taken by the Working Group at its fourth session in 1975. The years that had elapsed since then had shown that it was not enough to discuss and adopt new international instruments. It was essential that such instruments obtain general support.

25. He hoped that, upon completion of the work before the Working Group, clear guidelines for further action would be established, and the countries of Group D were prepared to co-operate actively in order to achieve this aim.

26. The representative of China said that the secretariat's report constituted a comprehensive and in-depth analysis, and work on charter parties, which had begun 15 years previously at the Working Group's fourth session, was of practical significance for all parties involved in chartering.

27. His country was a developing country, and from the point of view of both its charterers and shipowners, the existing system in chartering leftt much room for improvement. Accordingly, standardization and rationalization of charter party clauses on the one hand and the definition of terms used in charter parties on the other would help to clarify rights and responsibilities, demarcate risk in a rational manner and reduce the number of disputes. Standardization of charter clauses and clarification of terms should therefore be the subject of substantive consideration by the Working Group.

28. The representative of Mexico, referring to the importance of the subject of charter parties, stressed the serious economic implications charter parties had for his country. In that connection, a pamphlet had recently been published by an institution in his country that highlighted the various problems relating to the meaning of the wording in various clauses used in charter parties such as TEXACOTIME 2, INTERTANKTIME and ASBA VOYAGE II.

29. The secretariat's report (TD/B/C.4/ISL/55) had clearly indicated the problem of interpretation of charter parties and the need for updating and harmonization. Referring to the "both to blame collision" clause, he added that charter party clauses were usually based on Anglo-Saxon law, and it was very difficult to accept and to explain those clauses to practitioners and national courts in Latin countries with a Roman law background.

30. The secretariat's report revealed that some charter party clauses had to be updated because of their deficiencies and lack of clarity. It was therefore clear that: (i) harmonization and improvement of charter party clauses was necessary; (ii) international legislation on charter parties should be adopted on the basis of national models already existing in some countries; (iii) definition of the basic terminology employed in charter parties was essential; (iv) a clear distinction was needed between the various contracts used to operate ships.

31. The representative of Argentina said that the report prepared by the UNCTAD secretariat (TD/B/C.4/ISL/55) constituted a valuable source of reference, and the task now before the Working Group was to move forward in updating and modernizing charter parties. He stressed that improvements to the present legal régime concerning charter parties were necessary and interpretation of the clauses used in charter parties had to be facilitated, particularly since the outdated language used in standard charter party forms was quite often very difficult to understand. His country was heavily involved in overseas trade activities, and problems concerning ship chartering arose constantly. He hoped that the activities of UNCTAD on the subject would improve the present situation for the benefit of all parties involved and that either an international convention or UNCTAD model rules embodying a modern, practical text would be prepared.

32. With regard to the problem of seaworthiness of vessels, charter parties often did not contain clear stipulations on this particular subject and a reference to the Hague Rules assisted the parties in interpreting the charter terms. In the case of the GENCON form, international conventions such as the Hague or Hague-Visby Rules were directly incorporated into the charter party in order to abolish outdated clauses dealing only with seaworthiness at the commencement of the voyage.

33. The representative of Poland said that the secretariat's report provided a good basis for the work of the Working Group in re-examining, redrafting and eliminating outdated, one-sided or ambiguous standard clauses. Work should proceed on harmonization, standardization and improvement of charter party clauses, as well as on drafting definitions of basic terms and phrases, in order to minimize litigation and to avoid biased wording in standard clauses. Charter parties were mainly drafted in the English language, but in drafting charter parties used in international trade one had to try to avoid making reference to legal concepts based only on common law and should rather refer to transnational terms and concepts familiar to various legal systems. In that connection, he emphasized the importance of wider representation and collaboration of the international shipping and trading community, as well as the developing countries, in the regulation and improvement of charter parties.

34. However, his country was not convinced of the need for international legislative action that would impose mandatory regulations on charter contracts. Given the existence of different rules (the Hague rules, the Hague-Visby rules and soon probably the Hamburg Rules), the question would inevitably arise as to which legal régime the proposed mandatory rules should be based on. It had to be left to parties to agree which rules were applicable to their contracts. He therefore supported the idea of working out model clauses but not any mandatory legislation.

35. In developing its recommendations, the Working Group might wish to take account of NUVOY, a universal voyage charter party worked out by Polish shipping experts in 1964 and revised in 1984 and recommended by BIMCO and the General Council of British Shipping. NUVOY had become increasingly popular and had not been the source of many arbitrations or litigations.

36. The representative of the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) said that his organization was the core legal body in the United Nations system regarding unification and harmonization of international trade law. The two directions of his organization's mandate were to monitor international developments and co-ordinate the work of United Nations agencies, and to undertake activities by itself when the need was demonstrated. The mandates of UNCITRAL and UNCTAD were complementary. Thus standardization and harmonization of clauses in charter parties could be entrusted to UNCTAD, and the task of considering legislation could be left to UNCITRAL.

37. With regard to the need for legislative action, three questions remained open: (i) was unification of law in the area of charter parties useful; (ii) to what extent should uniform rules, if established, be mandatory or non-mandatory; and (iii) what should be the scope of those uniform rules.

38. Finally, the Working Group might wish to request UNCITRAL to consider further the need for any legislative work, in close co-operation with UNCTAD.

39. The observer for the Baltic and International Maritime Council (BIMCO) said that his organization had helped formulate approximately 60 charter parties and other shipping documents, many of the charter parties being so-called "agreed" charter parties. The drafting and negotiating of agreed charter parties was an ongoing process.

40. The secretariat's report (TD/B/C.4/ISL/55) gave the impression that charter party disputes were inherent to almost each and every fixture. In fact, however, less than 1 per cent of charter parties gave rise to disputes, and the majority of those disputes were disputes of fact and not of interpretation.

41. With regard to standard form contracts, there was a contradiction between paragraph 395 of the secretariat's report, which stated that in many trades in the shipping industry there were no longer standard form contracts, and paragraph 208, which indicated that more than 50 standard voyage charter party forms were used. With reference to paragraph 405 of the report, since the fourth session of the Working Group in 1975 more than 56 charter parties and bills of lading had either been withdrawn as obsolete or had been revised or newly drafted. He therefore concluded that the shipping community was able to react in accordance with the requirements of the market.

42. With respect to the charter parties annexed to the secretariat's report, he said that the choice was disappointing, since some had not been discussed with shipowners at all. Several agreed charter parties existed for the cases in question which had given rise to few disputes. It was also to be regretted, that seaway bills, now used in many trades, were not mentioned in the UNCTAD report. In some trades, for 85 per cent of cargoes carried there was no need for a negotiable bill of lading because the cargo was not being sold during transit.

43. Finally, on the subject of mandatory legislation, he said that bill-of-lading holders were always protected by the Hague or Hague-Visby Rules and that shipowners could not contract out of their liability under mandatory rules.

44. The observer for the Institute of Chartered Shipbrokers said that he agreed with the conclusion in paragraph 354 of the report that when considering any standardization, harmonization or improvement of charter terms and any necessity for international legislative action, due account should be taken of the interests of third-party bill-of-lading holders, as well as those of charterers and shipowners.

45. With regard to mandatory legislation, the preference of his organization would be for meaningful pre-discussion with the shipping industry directed towards voluntary adoption of a suitable charter party provision dealing with the point, thus achieving the desired result more quickly than legislation would permit and preserving a valued freedom to contract in the freight market.

46. The overall thrust of the secretariat's report was towards discussion with the relevant organizations on points which had regularly given rise to disputes, the overall purpose being to ensure that market fluctuations should

not influence the terms and conditions of charter parties but be reflected in the freight rate only. To this end, clarification of ambiguous terms must surely commend itself to all parties. His organization therefore accepted the secretariat's report in toto as a basis for discussion with relevant organizations.

47. With regard to harmonization, he agreed that most of the clauses listed in paragraph 406 of document TD/B/C.4/ISL/55 were indeed capable of harmonization and/or improvement. With regard to arbitration, available figures for 1985 to 1988 indicated that, in spite of some withdrawals and additions of charter party forms for particular commodities, there had been no substantial variations in the number of disputes over charter parties since UNCTAD last considered the subject in 1974. Finally, some uniformity already existed in the component parts of the movement of goods internationally, but dry cargo voyage charter parties, for which there were still over 50 so-called "standard" forms plus special charterers' forms, presented the major problem in terms of lack of harmony.

48. The observer for the Japan Shipping Exchange, Inc. said that his organization had drawn up approximately 50 well-balanced standard maritime documents, including a number of charter parties in the English language.

49. Shipping was a highly specialized and technical business, and newcomers to the business had to acquire an understanding of the prevailing customs and, with regard to charter parties, study the relevant legal cases. What was needed, therefore, was more study of charter parties, not new rules or terms.

50. With regard to standardization, harmonization and improvement of charter party clauses, such activities must be undertaken by the drafting organizations themselves. As far as his organization was concerned, whenever new business situations arose, the possible need to amend clauses was examined.

51. Concerning disputes over charter parties, his organization had not had many disputes arising over interpretation of clauses. Most disputes related to unilateral failure of charter parties or to questions of fact. Moreover, however standarized or clear the terms used in charter parties were, interpretation would be necessary, inevitably giving rise to differences of opinion or disputes. New terms would only introduce new confusion.

52. Finally, it must be emphasized that mandatory legislation could never be acceptable.

53. The observer for the Federation of National Associations of Ship Brokers and Agents FONASBA) said the fact that there were over 2,000 arbitration appointments in London did not mean that there was the same number of disputes, the ratio between appointments and awards being at least three to one. This was because a substantial proportion of appointments were made to beat a time bar and included cases of non-payment of freight and demurrage: these were frequently settled before reaching an arbitration hearing and had no relevance to charter parties or their clauses.

54. With regard to charter party reforms, efforts had been ongoing since 1975, the weak link being their adoption by the market. The NORGRAIN charter was one of the successful modern charter party forms in use by a number of grain charterers, while the MULTIFORM charter, designed as a modern and possible viable alternative to the GENCON, was scarcely used.

55. Problem areas did exist for which there were no quick, easy or simple solutions to prescribe, but any proposal involving mandatory application would be resisted by the market. Nevertheless, he believed that the efforts of the private sector should be intensified, with the participation of UNCTAD, and if it could be shown that developing countries, or for that matter any country, had been prejudiced by conditions described and justifiably criticized in the UNCTAD secretariat's report, then the solution would lie in education of those who dealt with the subject. His organization was ready to assist in that process and in any domain decided by the Working Group in relation to charter parties.

56. The spokesman for Group B (Netherlands) said that from the outset, Group B had not excluded the possibility that examination of the issues raised by both TD/B/C.4/ISL/13 and TD/B/C.4/ISL/55 might reveal problems related to charter parties. The issues raised in the documents were of a general nature and did not reveal problems unique to developing countries. Document TD/B/C.4/ISL/55 concentrated on a number of badly drafted clauses but did not take sufficient account of the fact that there existed corresponding clauses and indeed whole charter parties which were adequately drafted. What Group B had expected to hear was whether there were specific problems faced by the shipping community in developing countries and to what extent charter-party-related issues had specific adverse effects on the economic interests of these countries. It must be borne in mind that developing countries' interests included those of both shipowners and charterers.

57. Although Group B countries had listened very carefully to the views expressed, they had not yet detected any problems experienced by developing countries that specifically adversely affected their economic interests and thus merited further consideration by the Working Group.

58. If the Working Group was to pursue the topic of charter parties, it must do so on the basis of clearly identified problems affecting in particular the economic interests of developing countries. Only following detailed consideration of such clearly identified issues would the Working Group be in a position to decide whether any follow-up, touching on purely commercial matters, might be necessary.

59. The spokesman for the Group of 77 (Ghana) said that, with regard to the statement of Group B, the assessment of the economic consequences of chartering for developing countries would require statistics and data which were necessarily of a confidential nature, but a number of general issues could be raised. Firstly, the cost of litigation over the antiquated terms used in charter parties was prohibitive for developing countries, particularly in cases involving clauses with economic implications, and the number of arbitrations during the past 16 years had not decreased. If there had been so much improvement and revision during those years, as claimed by Group B and BIMCO, why were the supposed beneficial effects not obvious? Secondly, charter party forms and clauses were drafted in the English language and based on Anglo-Saxon law, subject to principles hard to understand and apply in

relation to Roman law concepts. Thirdly, developing country shipowners, not aware of the implications of some of the so-called "modern" charter parties such as ASBATIME, would be subjected to a strict liability régime not even covered by the P & I Clubs, since their rules only applied up to the limit of the Hague and Hague-Visby Rules. Fourthly, uncertainties existed in relation to responsibility for cargo claims under charter parties and bills of lading issued under them. In that connection, consultations with commercial parties in developing countries had revealed that those parties did not feel as safe and comfortable as commercial circles consulted in Group B countries.

60. With respect to Group B's observations on standardization, harmonization or improvement of core clauses of charter parties, the Group of 77 agreed that clauses should not be taken out of context. Indeed, some charter party disputes were due to widespread use of old and insufficiently comprehensive charter party forms, and the parties were forced to resort to patchwork addition of clauses from totally different standard forms without any adaptation. However, there was no intention of imposing any standard charter party form or clause upon commercial parties, but that did not mean that charter party clauses could not be improved and updated in order to clarify the obligations undertaken and to reduce disputes. Alternative provisions could be drafted so that the parties to a charter could more easily assess the value of each alternative division of risk or expense in terms of freight or hire.

61. Concerning the necessity for international legislative action, the Group of 77 did not believe that the application of mandatory rules to charter parties would eliminate the flexibility inherent in the present system. If only the limited area of cargo responsibility was covered, in line with the Hague and Hague-Visby Rules, parties would still be left free to negotiate the terms they required for their particular charter party.

62. As regards definitions of basic terms, such definitions would not be of only limited practical use. The Charter Party Laytime Definitions 1980 had not been sufficiently promoted or incorporated into standard party forms. The inclusion of the definitions in the printed forms would not prevent parties deleting them if they so wished.

63. With regard to the statement of BIMCO, a number of agreed charter parties may well have been revised or withdrawn, but agreed charter parties were not the main cause of the problem. Nothing was being done in relation to old and outdated charter parties such as GENCON and BALTIME, which were still widely used and continued to be a source of litigation. The GENCON charter party, for example, with its many deleted printed clauses and large number of additional clauses, could hardly be regarded as a standard charter party form suitable for modern maritime transport. There was therefore no inconsistency between the statements in paragraphs 208 and 395 of the secretariat's report. In addition, while many charter parties had been improved, it was essential for any future improvement to be carried out in a representative intergovernmental organization such as UNCTAD.

64. BIMCO had further stated that the greatest number of charter party problems arose from disputes on facts and not in interpretation. However, the secretariat's report showed that a large proportion of disputes related to interpretation of old and obscure charter party wording. Further, though it was true that shipowners could not contract out of liability under bills of

lading subject to mandatory Hague and Hague-Visby Rules, if the charter party contained clauses removing from the shipowner liability for loading, stowing and discharging and if the charter party terms were incorporated into bills of lading, the third-party bill-of-lading holder subject to Hague or Hague-Visby Rules might not be able to claim against the shipowner for loss or damage to goods caused during loading, stowing or discharging. That situation would not be nullified by the requirement of Article II, Rule 2 of the Hague Rules, because at least according to English law those words did not define the scope of the contract service but the terms upon which the agreed service was to be performed.

65. Finally, the Group of 77 was pleased to note that the Working Group's mandate, as set out in Committee on Shipping resolution 7 (III), was not in question.

66. The spokesman for Group B (Netherlands), referring to the recommendations and conclusions in chapter VI of the UNCTAD secretariat's report, said that, as far as standardization, harmonization and improvement of charter parties was concerned, Group B could not entirely agree with the statement in paragraph 405 of the report that the international shipping industry did not appear to have developed any sufficiently effective mechanism for discouraging the use of outdated forms nor for encouraging the use of modern, better drafted forms. In fact, private industry had made considerable efforts to change obsolete charter party forms since 1975. Moreover, the impression given in the report that disputes were inherent in many fixtures of charter parties was not correct. Less than 1 per cent of all charter parties resulted in disputes, the number of arbitration cases had not increased since 1974, and a lot of those disputes were on facts and not on interpretation of particular terms. With regard to the charter parties annexed to the secretariat's report, a more balanced selection would probably have resulted in a different conclusion. Group B did not agree that charter party clauses differed for mainly historical reasons; account also had to be taken of the commodities involved and regional circumstances.

67. As far as the legislative action recommended by the secretariat was concerned, he stressed that this proposal did not take account of the differences between bill-of-lading contracts and charter parties and could not be supported by Group B. Unlike bill-of-lading contracts, charter parties were freely negotiated by parties with equal bargaining power. Parties to a charter did not seem to need the same protection as bill-of-lading holders, and application of mandatory legislation to charter parties would reduce the flexibility of the chartering system and give rise to additional disputes.

68. As far as the definition of basic terms was concerned, even if such definitions were prepared, there was no guarantee that they would actually be used by the shipping industry. However, Group B was prepared to consider this subject, if the other delegations so wished.

69. The Deputy Director of the Shipping Division informed the Working Group of a letter received from the President of the International Maritime Committee. The latter emphasized that, if the Working Group decided it was necessary to investigate further the need for mandatory legislation in the field of time and voyage charter parties, CMI would be glad to co-operate with the Working Group.

70. At the Working Group's 92nd plenary meeting, on 25 October 1990, the spokesman for the Group of 77 (Ghana) introduced a draft resolution, entitled "Charter parties", on behalf of the States members of the Group of 77 (TD/B/C.4/ISL/L.84).

71. At the Working Group's 93rd plenary meeting, on 25 October 1990, the spokesman for Group B (Netherlands) introduced a draft resolution, entitled "Charter parties", on behalf of the States members of Group B (TD/B/C.4/ISL/L.85).

72. The representative of Argentina said that it was important to take a step forward in improving the charter party system in the interests of all countries of the world. The draft resolution proposed by the Group of 77 represented a good response to the existing state of affairs and would make it possible to study charter parties in appropriate depth. Group B's draft resolution, however, appeared to run the risk of postponing serious consideration of charter parties in UNCTAD for a very long time.

73. The representative of Mexico, expressing strong support for the representative of Argentina, said that the suggestions in Group B's draft resolution concerning education and information did not correspond to the concerns expressed in his delegation's first statement. His country, for example, had a long tradition in maritime law, but what it needed now was harmonization, improvement, international legislation and definitions of terms in the field of charter parties, as well as a clear distinction between the various contracts used to operate ships.

74. The spokesman for Group B (Netherlands) said that the draft resolution submitted by Group B met many of the concerns expressed by the Group of 77. In addition, by addressing itself to commercial parties, it made it possible for work on charter parties to begin without delay.

Action by the Working Group

75. At the Working Group's 95th (closing) plenary, on 1 November 1990, the Chairman informed the Working Group that an informal working group had been established to consider the draft resolutions submitted by the Group of 77 (TD/B/C.4/ISL/L.84) and Group B (TD/B/C.4/ISL/L.85). The informal working group had also considered a Chairman's draft compromise text (UNCTAD/PSM/CAS/245). Unfortunately, no consensus had been reached.

76. The Working Group decided to annex to its report the draft resolutions submitted by the Group of 77 and Group B, as well as the Chairman's draft compromise text (see annex I).

Closing statements

77. The spokesman for the Group of 77 (Ghana) said his Group was disappointed that the Working Group had not been able to reach agreement on follow-up action in respect of charter parties. The main reason for the failure to reach consensus was the question of the apportionment of mandates for further action in areas where delegations from all Groups had identified problems and which required co-operative corrective measures. Such areas included confusion, problems of interpretation, and litigation arising from the

continued use of old and outdated charter party forms, some dating from the beginning of the century. There was no doubt that all parties in the negotiations recognized the need to work towards the harmonization, standardization and improvement of such charter party forms.

78. He recalled the initial position of the Group of 77, which would have made UNCTAD the vehicle for initiating the process of change through the establishment of machinery for dialogue with international commercial organizations, and he noted the fact that his Group had requested the preparation of draft mandatory and non-mandatory rules for application to charter parties. In spite of this initial position and in a spirit of compromise, the Group of 77 had been prepared to accept the Chairman's compromise text, even though it did not meet all their aspirations. It had diffused the role envisaged for the UNCTAD secretariat in the process of change, improvement, harmonization and definition of core clauses used in charter parties and had deleted the request for the preparation of mandatory rules for application to charter parties. It was therefore regrettable that the Working Group had been unable to accept the compromise, despite evident will on the part of the Group of 77 to co-operate.

79. The Group of 77 firmly believed that its concerns and interests could not and would not be taken into account in a forum provided for the international commercial organizations themselves to seek a private-sector solution to the problems identified, since these organizations represented private commercial interests who were the very beneficiaries of the status quo. For the Group of 77, only the active involvement of the UNCTAD secretariat would have ensured a measure of representation for developing countries. He stressed that intergovernmental machinery, open to all Governments and the private sector, would have been able to initiate a dialogue capable of achieving results through consensus. His Group was seeking representation in a forum that guaranteed the freedom of debate and decision-making which characterized the United Nations. At present, Governments appeared to be helpless to give direction to the private sector, and an opportunity had been missed to send a signal to the private sector that Governments genuinely wanted to see changes in the operation of charter parties.

80. Finally, he stressed that the inability to reach a consensus did not in any way prejudice the functions of UNCTAD in connection with charter parties within existing mandates, and he was hopeful that the process of consultation would continue so as to enable the work of the Working Group to proceed under the auspices of UNCTAD.

81. The spokesman for Group B (Netherlands) recalled that, despite its reservations concerning the recommendation for future work contained in chapter VI of document TD/B/C.4/ISL/55, his Group had come to the session of the Working Group with an open mind, and he therefore regretted that, despite the efforts of all Groups, no agreement on the future direction and programme of work on charter parties could be reached.

82. He regretted that the substantive material in documents TD/B/C.4/ISL/13 and TD/B/C.4/ISL/55 had never really been discussed and that what discussion had taken place had concentrated on the UNCTAD secretariat's recommendations for further work. He emphasized that from the outset Group B had been concerned that: (a) the recommendations had not been justified, in particular because it was not clearly demonstrated that there were adverse economic

effects caused to interests in developing countries; (b) UNCTAD might not, on its own, be the most appropriate body for other actions recommended in the report, if such actions were needed; and (c) no work was needed on mandatory rules or non-mandatory model rules to be applied to time or voyage charter parties.

83. In submitting its draft resolution, Group B had clearly indicated that no significant problems had been identified meriting extensive corrective action. After hearing the views of the other Groups and China on the draft resolution, Group B had submitted on an informal basis a possible alternative to the draft resolution (Working Paper No. 5) in order to narrow the gap between the positions to be found in TD/B/C.4/ISL/L.84 and TD/B/C.4/ISL/L.85. In that text, Group B had recognized the mandate given to and the work done by the UNCTAD secretariat, the essential commercial character of charter parties and the point raised by the Group of 77, accepted by Group B, that charter parties should strike an equitable balance between the parties involved. It had encouraged international commercial organizations to take on board the lessons to be found in TD/B/C.4/ISL/55, to promote the use of modern charter parties, and to report to UNCTAD on the work done in paragraph 1 of Working Paper No 5. Furthermore, the UNCTAD secretariat had been asked to report on the adverse economic effects for developing countries arising from existing charter parties and to determine, in consultation with the international commercial organizations, the core clauses and terminology in charter parties that had caused problems for developing countries. Finally, the text had repeated the suggestions in TD/B/C.4/L.85 for an educational role for UNCTAD, with amendments to reflect the positive comments of other Groups on this aspect.

84. Group B was disappointed that that considerable move on its part had not been matched by an equivalent response by the Group of 77 and that the Group of 77 had continued to insist that the UNCTAD secretariat should have primacy in determining the core clauses and terminology requiring change or definition and in drafting alternatives. Moreover, although the Group of 77 had been prepared to drop its requirement for mandatory rules, it had nevertheless maintained that non-mandatory rules should be developed for charter parties.

85. With regard to the compromise text prepared by the Chairman, although Group B had dropped most of the amendments it had initially sought, the proposal to undertake further work on non-mandatory model rules had remained a basic problem for it. No consensus could be found, since the Group of 77 had not been prepared to take account of this single point on which Group B could not make further concessions.

86. In concluding, he stressed that Group B hoped that the session had not been wholly wasted and that international commercial organizations would reflect and act on the relevant analysis to be found in TD/B/C.4/ISL/55.

87. The representative of China expressed disappointment at the lack of consensus in the Working Group which made prospects for future work on the important subject of charter parties uncertain and unclear. The Chairman's text would have been a reasonable basis for compromise.

88. Referring to the question of whether UNCTAD or non-governmental international organizations should be the focal point for further substantive work on charter parties, he said that international civil and commercial organizations were not able to properly reflect the interests of all concerned since they were basically shipowners' organizations and could not act as an intergovernmental forum where the interests of all parties, in particular those of developing countries, could be considered. Such international commercial and non-governmental organizations could be invited by UNCTAD to co-operate in any further work on the subject. UNCTAD had already been very successful in the establishment of the principles of a new international economic order in shipping. There was also a clear mandate for the Working Group and the UNCTAD secretariat to examine and improve existing law and practice in the field of ship chartering, and UNCTAD should therefore remain the forum responsible for consideration of the problems relating to charter parties. He was convinced that the Committee on Shipping would make appropriate arrangements to that end.

89. The Director of the Shipping Division emphasized that it was indeed unfortunate that the session of the Working Group had been concluded without any constructive result. He fully shared the concern expressed by the Group of 77 and China and stressed that, in view of the importance of the subject of charter parties, particularly for developing countries, future action within the Working Group was urgently required. As had been demonstrated by the work carried out by the Working Group in respect of marine insurance, UNCTAD was the appropriate forum for combined effort and co-operation between governmental, non-governmental and commercial organizations. The draft resolutions to be annexed to the Working Group's report would be submitted to the Committee on Shipping at its fifteenth session, where it was sincerely hoped that an acceptable solution would be found in order to allow the work to progress without further delay.

90. The Chairman said it was regrettable that, after long and intensive negotiations, it had not been possible to arrive at a consensus on the main subject before the Working Group. The subject of charter parties was extremely delicate, and he hoped that the Working Group's report and its annexes containing the two draft resolutions and his own draft compromise text would assist the Committee on Shipping at its fifteenth session to achieve a decision on follow-up work on charter parties.

91. The Working Group's terms of reference stipulated that the Group should consider economic and trade aspects of international shipping legislation and practice from the point of view of the needs of economic development, particularly of the developing countries, and the Group was therefore the appropriate body to deal with problems arising from existing chartering practice. Developing countries must try to ensure that any reform undertaken in the field of charter parties would be to the benefit of all countries and all parties involved in the business of shipping.

Chapter II

ORGANIZATIONAL MATTERS

A. Opening of the session

92. The twelfth session of the Working Group on International Shipping Legislation was opened on 22 October 1990 by Mr. Wall (United Kingdom) acting on behalf of the Chairman of the Working Group at its eleventh session.

B. Election of officers

(agenda item 1)

93. At its 88th (opening) plenary meeting, on 22 October 1990, the Working Group elected its bureau, as follows:

Chairman:	Mr. René Abessolo Eyi	(Cameroon)
Rapporteur:	Mr. Mark Gauthier	(Canada)
Vice-Chairmen:	Mr. Karl-Johan Gombrii	(Norway)
	Mr. George Ivanov	(Union of Soviet Socialist Republics)
	Mr. José Ensebio Salgado	(Mexico)
	Mr. Johan Syahperi	(Indonesia)
	Mr. Zhu Zengjie	(China)

C. Adoption of the agenda and organization of work

(agenda item 2)

94. At its 88th (opening) plenary meeting, on 22 October 1990, the Working Group adopted its provisional agenda (TD/B/C.4/ISL/54), as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. Charter parties
4. Provisional agenda and date of the thirteenth session of the Working Group
5. Other business
6. Adoption of the report of the Working Group to the Committee on Shipping

D. Membership and attendance 1/

95. The following States members of UNCTAD members of the Working Group were represented at the session: Algeria; Argentina; Australia; Belgium; Brazil; Cameroon; Canada; China; Côte d'Ivoire; Democratic People's Republic of Korea; Denmark; Egypt; Ethiopia; Finland; France; Germany; Ghana; Greece; Hungary; India; Indonesia; Iran (Islamic Republic of); Italy; Japan; Kenya; Kuwait; Lebanon; Libyan Arab Jamahiriya; Madagascar; Mexico; Morocco; Netherlands; Nigeria; Norway; Panama; Philippines; Poland; Portugal; Qatar; Republic of Korea; Sao Tome and Principe; Saudi Arabia; Senegal; Spain; Sri Lanka; Sudan; Sweden; Switzerland; Thailand; Tunisia; Turkey; Union of Soviet Socialist Republics; United Arab Emirates, United Kingdom of Great Britain and Northern Ireland; United Republic of Tanzania; Zaire.

96. The United Nations Commission on International Trade Law was represented at the session. The International Trade Centre UNCTAD-GATT was also represented at the session.

97. The following international organization was represented at the session: General Agreement on Tariffs and Trade.

98. The following intergovernmental organizations were represented at the session: League of Arab States; Ministerial Conference of West and Central African States on Maritime Transport; Organisation for Economic Co-operation and Development; Organization of African Unity.

99. The following non-governmental organizations were represented at the session: General Category: International Bar Association; International Chamber of Commerce. Special Category: Baltic and International Maritime Council; Council of European and Japanese National Shipowners' Association; Federation of National Associations of Ship Brokers and Agents; International Association of Independent Tanker Owners; International Association of Dry Cargo Shipowners; International Chamber of Shipping; International Maritime Committee.

100. The following non-governmental organizations, specially invited by the UNCTAD secretariat, were represented at the session: Institute of Chartered Shipbrokers; Japan Shipping Exchange, Inc.

1/ For the list of participants, see document TD/B/C.4/ISL/INF.13.

E. Provisional agenda and date of the thirteenth session of the Working Group

(Agenda item 4)

101. At its 95th (closing) plenary meeting, on 1 November 1990, the Working Group approved the draft provisional agenda for its thirteenth session (TD/B/C.4/ISL/L.86) (see annex II).

102. The Chairman noted that, at the first part of its thirty-seventh session, the Trade and Development Board had taken note of the draft calendar of meetings for 1991, on the understanding that the schedule for all UNCTAD meetings in 1991 would be reviewed in the light of the timing of UNCTAD VIII. According to the draft calendar of meetings for 1991, the Working Group's thirteenth session would be held from 11 to 19 November 1991.

103. The representative of France said that the dates given for the Working Group's thirteenth session were acceptable on condition that interpretation into French could be provided.

F. Adoption of the report of the Working Group to the Committee on Shipping

(Agenda item 6)

104. At its 95th (closing) plenary meeting, on 1 November 1990, the Working Group adopted its draft report on its twelfth session (TD/B/C.4/ISL/L.83 and Add.1 and 2) and authorized the Rapporteur to complete the report as appropriate.

Annex I

DRAFT RESOLUTIONS SUBMITTED IN THE COURSE OF THE WORKING GROUP'S TWELFTH SESSION a/

Charter parties: Draft resolution submitted by Ghana on behalf of the States members of the Group of 77

The Working Group on International Shipping Legislation,

Taking note of the report of the UNCTAD secretariat in document TD/B/C.4/ISL/55,

Recalling Committee on Shipping resolutions 7 (III), 49 (X) and 61 (XIII),

1. Requests the UNCTAD secretariat, in consultation with relevant commercial organizations, to identify suitable charter party core clauses, in voyage and time charter parties, and to prepare appropriate draft clauses for the consideration of the Working Group on International Shipping Legislation at its thirteenth session;

2. Requests further the UNCTAD secretariat, in consultation with the relevant international commercial organizations, to determine the most suitable terms in time and voyage charter parties for agreed definitions and to prepare appropriate draft definitions for the consideration of the Working Group at its thirteenth session;

3. Requests also the UNCTAD secretariat to prepare draft rules specially designed for application to charter parties and to further examine whether such rules should be applied to charter parties mandatorily or by contractual incorporation. In doing so, the secretariat should particularly study the following issues:

(i) The impact of mandatory legislation if applied to voyage charter parties alone, or if applied to both voyage and time charter parties;

(ii) The impact of mandatory legislation if applied only to cargo-carrying voyages and cargo operations, or if applied to all voyages and all operations under a charter party.

Charter parties: Draft resolution submitted by the Netherlands on behalf of the States members of Group B

The Working Group on International Shipping Legislation,

Recalling resolutions 7 (III), 49 (X) and 61 (XIII) of the Committee on Shipping,

Taking note of the report by the UNCTAD secretariat entitled "Charter parties - a comparative analysis" (TD/B/C.4/ISL/55) and recalling the report prepared by the UNCTAD secretariat for the fourth session of the Working Group

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a/ See para. 76 above.

entitled "Charter parties" (TD/B/C.4/ISL/13), as well as the request for further studies as adopted by the Working Group at its fourth session (TD/B/C.4/ISL/126 and Corr.1),

Recognizing that no significant problems have been identified meriting extensive corrective actions at this time,

1. Invites the international commercial organizations dealing with charter parties:

(i) To consider if a review of charter parties appears appropriate, taking into account new trends and/or developments in chartering markets,

(ii) To promote the usage of modern charter parties;

2. Requests the UNCTAD secretariat to report to the fifteenth session of the Committee on Shipping on any identified adverse economic difficulties for developing countries arising from existing charter parties;

3. Requests further the UNCTAD secretariat, within existing resources, and in close collaboration with the international commercial organizations dealing with standardization of charter parties:

(i) To prepare an educational programme;

(ii) To produce a document describing: the main features of charter parties, including a listing of modern charter parties, particularly those involving shipments of main interest to developing countries, e.g. grain, soya, rice, fertilizers, phosphates, ores, timber, cement, sugar, copra, livestock and oil; the terminology used in common and civil law contracts and the points to be borne in mind when negotiating such contracts.

Chairman's draft compromise text

The Working Group on International Shipping Legislation,

Recalling resolutions 7 (III), 49 (X) and 61 (XIII) of the Committee on Shipping,

Taking note of the report by the UNCTAD secretariat entitled "Charter Parties - A comparative analysis" (TD/B/C.4/ISL/55), and recalling the report prepared by the UNCTAD secretariat for the fourth session of the Working Group entitled "Charter Parties" (TD/B/C.4/ISL/13, as well as the request for further studies as adopted by the Working Group at its fourth session (TD/B/C.4/ISL/126 and Corr.1),

Recognizing the competence of UNCTAD and international commercial organizations dealing with charter parties to undertake further work in this field,

Reaffirming the views expressed by all Groups that standard forms of charter parties should represent an equitable balance of rights and obligations of the different parties to time and voyage charter parties,

1. Invites the relevant international commercial organizations and the UNCTAD secretariat jointly:

- To consider the information contained in document TD/B/C.4/ISL/55 and to undertake as a matter of urgency a review of old charter parties such as, inter alia, Gencon, Centrocon River Plate Charter Party 1914, Mediterranean Iron Ore Charter Party C (Ore) 7, Americanized Welsh Coal Charter 1953 (Amended 1979), New York Produce Exchange Time Charter 1946, with a view to updating these charter parties to overcome problems as identified in TD/B/C.4/ISL/55 and in particular to:

  - Determine which clauses having general application in such charter parties need to be updated, and to propose recommendations for the revision of such clauses,

  - Identify which commonly used terms in charter parties are suitable for agreed definitions, and to propose recommendations for such definitions.

2. Requests the UNCTAD secretariat to report to the thirteenth session of the Working Group on International Shipping Legislation on the work carried out under paragraph 1 above.

3. Invites States members of the Group of 77 to inform the UNCTAD secretariat of any identified adverse economic difficulties for their countries arising from existing chartering practice, and requests the UNCTAD secretariat to report thereon to the thirteenth session of the Working Group on International Shipping Legislation.

4. Requests further the UNCTAD secretariat to:

- Expand and update its existing training course on charter parties,

- Produce, in close collaboration with the relevant international commercial organizations, a handbook drawing the attention of the commerical parties in developing countries to issues which should be taken into account in relation to chartering, including listing modern and suitable charter party forms.

5. Requests also the UNCTAD secretariat to prepare a set of non-mandatory model rules especially designed for application to charter parties.

6. Invites the relevant international commercial organizations, taking into account the work carried out under paragraph 1 above, to:

- Withdraw such old and outdated charter party forms, and:

- Strongly promote the usage of modern charter parties.

Annex II

PROVISIONAL AGENDA FOR THE THIRTEENTH SESSION OF THE WORKING GROUP

1. Election of officers
2. Adoption of the agenda and organization of work
3. General average
4. Provisional agenda and date of the fourteenth session of the Working Group
5. Other business
6. Adoption of the report of the Working Group to the Committee on Shipping.

Annex III

CHECKLIST OF DOCUMENTS

Symbol	Title	Agenda item
TD/B/C.4/ISL/54	Provisional agenda, annotations to the provisional agenda, suggestions for the organization of work	2
TD/B/C.4/ISL/55	Charter parties: a comparative analysis - report by the UNCTAD secretariat	3
TD/B/C.4/ISL/L.83 and Add.1 and 2	Draft report of the Working Group on International Shipping Legislation on its twelfth session	6
TD/B/C.4/ISL/L.84	Charter parties: draft resolution submitted by Ghana on behalf of the States members of the Group of 77	3
TD/B/C.4/ISL/L.85	Charter parties: draft resolution submitted by the Netherlands on behalf of the States members of Group B	3
TD/B/C.4/ISL/L.86	Draft provisional agenda for the thirteenth session of the Working Group submitted by the UNCTAD secretariat	4
UNCTAD/PSM/CAS/245	Chairman's draft compromise text	4
TD/B/C.4/ISL(XII)/Misc.1 and Add.1	Provisional list of participants	
TD/B/C.4/ISL/INF.13	List of participants	